Office - Supreme Court, U.S.
FILED
AUG 19 1982
ALEXANDER L. ST
CLERK

No. 81-2386

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

PHILIP DEL COSTELLO

Petitioner

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al., Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

REPLY BRIEF OF PETITIONER

WILLIAM H. ZINMAN, Esquire
and
RICHARD NEWIRTH, Esquire
1123 Munsey Building
Baltimore, Maryland 21202
(301) 727-6151
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioner raise the issues of a six month limitation period contained in the National Labor Relations Act before the District Court?

2. Is the Petitioner's action time-barred under the six month limitation period contained in the National Labor Relations Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CITATIONS	iii
ARGUMENT	1-10
CONCLUSION	10

TABLE OF CITATIONS

Page

Table of Cases

Adickes v. S. H. Kress Co.,
398 U.S. 144, 90 S.Ct. 1598 (1969) 9

Smart v. Ellis Trucking Co.,
580 F.2d. 215 (6th Cir., 1978) 9

Strikler v. Pfister Associated Growers,
319 F.2d. 788 6

United States of America v. Harue Hayashi,
282 F.2d. 599 (9th Cir., 1960) 6

Valdecker Packing Co. v. Corn Product
Sales Co., 411 F.2d. 850 (6th Cir.,1969) .. 6

State Statutes

Maryland, Courts and Judicial Proceedings
Article, Annotated Code of Maryland,
3-224 8

U. S. Statutes

29 U.S.C. 160(b) 2

No. 81-2386

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILIP DEL COSTELLO,

Petitioner

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

REPLY BRIEF OF PETITIONER

The Petitioner, pursuant to Rules 22.5 and 22.6 of the Supreme Court, files the following Reply Brief to the Respondents' Opposition Brief.

I

The Respondents rely on two patently frivolous arguments in support of their contention that this Court should not take Certiorari. First, the

Respondents contend that the Petitioners did not raise the issue of the six month period of limitations provided by the National Labor Relations Act (29 U.S.C. 160[b]) before the District Court. This is simply not true. After Mitchell was decided on April 20, 1981, the Respondents, on May 5, 1981, again raised the entire issue of limitations. In their Memorandum before the District Court, they pointed out that irrespective of whether the thirty day arbitral limitation period of Maryland, the ninety day arbitral limitation period of New Jersey, or the six month limitation period enumerated in the National Labor Relations Act is applied, the Petitioner is time-barred by reason of failing to initiate his law suit for seven months. Your Petitioner filed a Reply Memorandum before the District Court of Maryland on May 27, 1981, in which he stated (P.23, App. 1) as follows:[1]

> "The Maryland Uniform Arbitration Act or the National Labor Relations Act are the appropriate statutes to apply, if any."

---

1. App. refers to original papers filed with the Clerk of this Court.

Also, your Petitioner argued in his Memorandum before the District Court as follows (pp. 26, 27, App. 2, 3):

> "If Mitchell is to be construed and applied so as to mandate the initiation of a suit within 30, 90, or 180 days, whichever be the case, from the arbitration decision of July 19, 1977, in order to preserve the integrity of the arbitral process, the arbitral body, through its authorized agents, are similarly obligated to follow their own rules of procedure by clear and unequivocal notification to the Plaintiff, advising him of exactly when this decision was final and binding."

These contentions were further supported by citing this Court's concurring opinions in Mitchell by Justice Stewart and Justice Blackmun (P. 28 of the Petitioner's Memorandum before the District Court), in which these Judges called for a six month period of limitations. (App. 4)

Furthermore, the Respondents, in support of their contention that the six months limitations issue was not raised cite the Petitioner's argument totally out of context. In their Opposition Brief they quote the following passage from the Petitioner's argument to the District Court (pp.16,17):

"While it would be presumptuous to expect this Court to promulgate new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the Plaintiff to assert that the thirty day limitation period is unreasonably short."

Regrettably, the Respondents failed to quote the entire paragraph in which this passage is contained. The entire paragraph of your Petitioner's Memorandum before the District Court provides as follows (P.29, App. 5):

"While it is clear that Mitchell sanctioned the New York ninety day limitation period in 301 cases, it is respectfully suggested that the thirty day limitation period in Maryland is an unreasonably short time-bar. This proposition is supported by the concurring opinions in Mitchell, which would establish a six month period of limitations for filing 301 actions. The Mitchell court, at footnote 2, stated that they declined to consider the six month limitation period because the Respondent filed his claim beyond the six month period and therefore the issue is not before them, and in any event, the claimant would be barred even if the six month period were the law. While it would be presumptuous to expect this court to promulgate new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the Plaintiff to assert that

the thirty day limitation period is unreasonably short."

It is respectfully asserted that this entire argument was made within the context of that portion of the Petitioner's argument seeking a judicial declaration that thirty days was unreasonably short. It in no way constituted a waiver or abandonment of the six month limitation period contained in the National Labor Relations Act. This argument was appropriately tailored to the concerns of a District Court Judge who was understandably reluctant to promulgate national policy. Furthermore, in the Petitioner's Brief before the Fourth Circuit Court of Appeals, the issue of the six month limitation period was again raised on pages 34 through 38 of his Brief (App. 6--10), to which the Respondents replied on pages 41 through 45 of their Reply Brief (App. 11--15). Nowhere in their Reply Brief is there any contention of the Petitioner's failure to raise the issue of the six month limitation period.

It is well established that in federal practice

any question which has been presented to the Federal District Court for ruling and which has not thereafter been waived or withdrawn is preserved for review.

> United States of America v. Harue Hayashi, 282 F.2d. 599, 9th Cir., August 16, 1960; see also Strikler v. Pfister Associated Growers, 319 F. 2d. 788, and Valdecker Packing Co. v. Corn Product Sales Company, 411 F.2d. 850, 6th Cir., 1969.

Therefore, the contention that the Petitioners did not raise the six month period of limitations contained in the National Labor Relations Act is patently frivolous.

II

The Respondents also argue that since the Petitioners filed their action on March 16, 1978, approximately seven months from the date of the arbitral hearing on July 19, 1977, the six month period of limitations could not save this cause of action. Your Petitioner filed an affidavit before the District Court, to which the Respondents, with time and opportunity to do so, never

replied. (App. 16, 17) The factual allegations of the Petitioner's affidavit, which were accepted by the District Court as true. (See Del Costello v. I.B.T.,et al., 526 F.Supp. 725.) In substance, alleged that the Petitioner was reasonably led to believe, to his detriment, by the Respondents that the arbitral award was not final until December of 1977. Further, under the facts as alleged in the affidavit, both Respondents engaged in a course of conduct which reasonably led the Petitioner to believe, to his detriment, that there was a distinct possibility for re-hearing and for reinstatement due to the fraudulent conduct of the Respondent employer, and that under the rules of the arbitral body, the entire testimony of the employer's only witness was inadmissible. (App. 16, 17)

The net effect of these factual allegations, if true, presented the trier of fact with the issue of (1) finality of the award, (2) estoppel and waiver of the limitations defense by the Respondents, and (3) tolling of the limitations period from

July 19, 1977, to December of 1977. More importantly, the District Court, in its written opinion of October 22, 1981 (524 F.Supp. 725, Jones,J.), stated unequivocally:

> "As previously noted, it may well be that the Plaintiff's tolling argument has merit, and I have here assumed for the purpose of deciding the Motion (Respondent's Motion for Reconsideration of May 5, 1981) that the limitation period began to run in December of 1977."

Obviously, the District Court then applied the thirty day Maryland Statute of Limitations (Courts and Judicial Proceedings Article, Annotated Code of Maryland, Section 3-224) from December of 1977, and held the action time-barred because it was filed ninety days later, on March 16, 1978.

However, if, indeed, six months is the appropriate limitation period, rather than thirty days, this case would have been filed in a timely manner for purposes of meeting the defense of summary judgment.

The questions of estoppel, waiver, finality and tolling are factual matters for the trier of fact to address, and are not relevant for

consideration by an appellate court. More particularly, all allegations of fact and all reasonable inferences arising therefrom, must be presumed to be true and construed in a light most favorable to the party opposing the motion.

> Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1969).

If the Respondents desired to resolve these factual disputes, they should have done so by filing an appropriate reply affidavit coupled with subsequent discovery, which they failed to do despite the express invitation of your Petitioner. (See Petitioner's Memorandum in District Court of August 6, 1981, p. 1, App. 18.)

The tolling question of limitations was addressed in the case of Smart v. Ellis Trucking, 580 F.2d. 215, 219, Certiorari denied, 6th Cir., C.A. 1978, 440 U.S. 958 (1979), which held:

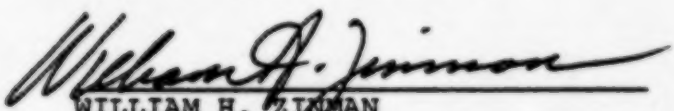
> "Although more than three years elapsed between the Appellant's discharge anf filing of his complaint, we think it only fair that the Statute of Limitations be tolled from the time the grievance was filed until it

was finally rejected."

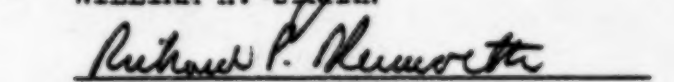
For these reasons, the Petitioner vigorously asserts, as he did in his original Petition, that this case is in a posture for remand and trial if this Court adopts the six month limitations period contained in the National Labor Relations Act.

Finally, it is respectfully urged that this case uniquely lends itself to a resolution of the entire limitations question in all fair representation suits because both the union and the employer, unlike Flowers (A. 81-2408) are both party defendants.

Respectfully submitted,



WILLIAM H. ZINMAN



RICHARD P. NEUWORTH

Attorneys for Petitioner